INDEX AND SUMMARY OF ARGUMENT.

A Few of the More Salient and General Facts..... 8

This Is the Third Attempt to Obtain Certiorari in this Litigation, Certiorari Having Already Been Twice Refused 9

The First Petition for a Writ of Certiorari..... 10

The Second Petition for a Writ of Certiorari..... 11

This Third Petition for a Writ of Certiorari..... 12

The Questions Which Were Decided by the Seventh Circuit Court of Appeals and Which Petitioner Now Seeks to Review Were Factual Questions. In Its Petition to this Court Defendant Pretends that Its Disproved Contentions Are Facts and Ignores the Contrary Findings of the Courts as to the Actual Facts 13

The Purely Factual Character of Every Question and Contention 14

Even the Petitioner's Arguments Are Necessarily Arguments of Fact,—in Contradiction of the Findings of the District Court and the Court of Appeals..... 20

APPENDIX:

Opinion of the United States Circuit Court of Appeals for the Seventh Circuit, Entered March 27, 1941 25

Opinion of the United States District Court for the Northern District of Illinois, Eastern Division, Entered July 5, 1940 26

Table of Cases.

General Talking Pictures Corp. *v.* Western El. Co., 304 U.S. 175, 178 23

Houston Oil Co. *v.* Goodrich, 245 U.S. 440..... 23

Layne & Bowler Corp. *v.* Western Well Works, 261 U.S. 387, 393 9

United States *v.* Chemical Foundation, 272 U.S. 1, 14.... 23

Wisconsin Electric Co. *v.* Dumore Co., 282 U.S. 813..... 23

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, A. D. 1940.

No. 984.

EDGAR C. GUTHARD,
ACTIVATED SLUDGE, LIMITED, and
ACTIVATED SLUDGE, INC.,
Plaintiffs-Respondents,

vs.

THE SANITARY DISTRICT OF CHICAGO,
Defendant-Petitioner.

BRIEF ON BEHALF OF THE RESPONDENT, ACTIVATED SLUDGE, INC., IN OPPOSITION TO THE DEFENDANT'S PETITION FOR A WRIT OF CERTIORARI.

Since the above entitled litigation was first instituted in 1924, the Sewerage Commission of the City of Milwaukee and the Sanitary District of Chicago have cooperated in

resisting the plaintiff's claims of infringement under the patents in suit and have employed the same counselors.

They have previously made two attempts to get the patent questions involved in this litigation before the Supreme Court on writs of certiorari.* Both of the previous petitions for writs of certiorari were denied.

As a basis for this third effort to get this patent infringement suit before the Supreme Court, counsel for the Sanitary District of Chicago concocted a motion or a petition for leave to file a petition to vacate a decree entered on February 8, 1935 and affirmed by the Seventh Circuit Court of Appeals on June 16, 1937, and to reopen the case for a further trial upon allegedly newly discovered evidence.

This motion was denied by the District Court. It was then made the subject matter of an appeal to the Seventh Circuit Court of Appeals. On March 27, 1941 the Seventh Circuit Court of Appeals affirmed the decision of the District Court in a short opinion adopting and approving the reasons given by his Honor, Judge Lindley, for denying the defendant's motion.

The pretense of counsel for the Sanitary District of Chicago is that in denying their motion for leave to file a petition to vacate and reopen, the District Court and the Court of Appeals flagrantly disregarded various well established principles of law.

In reality these principles of law have no applicability to the facts of the case. The real facts have no relation to the principles which counsel for the petitioner claim to have been disregarded and violated by the District Court and by the Court of Appeals.

Counsel for the petitioner have cleverly adopted an in-

* City of Milwaukee vs. Activated Sludge, Inc., 293 U. S. 576 Sanitary District of Chicago vs. Activated Sludge, Inc., 302 U. S. 736.

genious stratagem by which to circumvent or conceal the real situation.

Their stratagem is to say at about the outset of their petition for a writ of certiorari (page 4) that:

> "The material allegations of said petition" (to vacate the decree and reopen) "are not controverted by anything appearing in the record. The District Court, in passing upon the motion for leave to file, stated that it considered the matter 'as if the petition had been filed and its sufficiency were attacked by motion to strike or dismiss' (Record II—885). No answer to said petition was filed by respondents, no trial took place. No witness testified and no evidence was introduced other than the excerpts from certain records which were submitted by each of the parties, which excerpts together with said petition constitute the record herein."

The fact is that the records of the trials of the Milwaukee litigation and the Chicago litigation in which the defendants were represented by the same counselors, occupied more than eighteen thousand pages of printed matter. The plaintiff's main reliance in opposition to the defendant's motion for leave to file its petition to vacate and reopen was the trial records comprising these eighteen thousand pages.

The "record" which the petitioner presents to this court shows on page 105 that the plaintiff, long in advance of the hearing upon the defendant's motion for leave to file its petition to vacate and reopen, gave notice that it would rely upon and refer to these eighteen thousand pages of trial record and the briefs in the Milwaukee and Chicago litigations. These trial records and briefs were available to the District Court and were available to the Court of Appeals. Nevertheless they have not been included in the so-called "record" presented to this court.

The result is that what counsel for the petitioner refer to as "the record herein" is not the record at all,—but

only a fragment of the record. As a matter of fact, the plaintiff's main reliance in opposition to the defendant's motion for leave to file its petition to reopen, was the trial records and the briefs in the Milwaukee and Chicago litigations. The reason for this was that the trial records and the briefs in these cases so completely answered the allegations upon which the defendant based its motion for leave to file its petition to reopen. Nevertheless, counsel for the petitioner have now managed their presentation of the matter to this court as to exclude from your Honors' observation and consideration the great bulk of the matter upon which the plaintiff has heretofore relied in opposition to, and upon which the District Court and the Court of Appeals have relied in denying the defendant's motion for leave to file its petition to vacate and reopen.

The fact is, therefore, that the "record" which is presented to this court upon the petition for a writ of certiorari is not at all the record which the District Court had before it, nor the record which the Court of Appeals had before it in denying the defendant's motion for leave to file its petition to vacate and reopen.

In an effort to give your Honors the impression that their motion for leave to file a petition to vacate and reopen should have been treated simply as a bill of complaint in which the sufficiency of the allegations were in question upon a motion to dismiss, counsel for the petitioner say that in passing upon their motion the District Court stated that it considered the matter "as if the petition had been filed and its sufficiency were attacked by motion to strike or dismiss." In so doing, they quote a phrase which appeared in Judge Lindley's opinion.

There are many reasons for maintaining, as we do, that Judge Lindley neither treated the facts alleged in the defendant's petition as true, nor was warranted in accepting

the factual allegations of the defendant's petition as true.

One of the reasons for our view is that the law would not have permitted Judge Lindley to accept the facts alleged in the petition as true, despite convincing evidence to the contrary.

A second reason which confutes the defendant-petitioner is that the order with which Judge Lindley concluded his opinion was a denial of the defendant's motion for leave to file its petition (page 899 of the record presented by the petitioner). It was not the grant of any motion by the plaintiff to dismiss or to strike the petition as would have been the case if the matter had been treated or should have been treated in the manner claimed by the defendant-petitioner.

A third reason which contradicts the defendant-petitioner's intimations in this regard, is the memorandum-opinion of Judge Lindley. We have marked in our copy of this opinion one hundred and seven items of fact which Judge Lindley garnered,—not from the defendant's petition—but from the records of the prior litigations,—with which he contradicted or explained away the factual allegations of the defendant's petition to vacate and reopen. We shall not encumber this brief by quoting these one hundred and seven factual findings which Judge Lindley derived from the records of the prior litigations, rather than from the defendant's petition, with which to contradict or explain away the allegations of the defendant's petition. What we have in mind will be sufficiently indicated by quoting the first ten of these factual findings, all of which are quite extraneous to the defendant's petition to vacate and reopen, and as employed in Judge Lindley's opinion beginning on page 887 of the so-called "record" as presented by the petitioner to this court.

1. "A suit similar to this for infringement in favor

of the same plaintiff against the City of Milwaukee was pending at all times after institution of this cause."

2. "The trial occurring in 1929, four years prior to that of the instant suit."
3. "Counsel for defendant in this trial participated actively in that trial also."
4. "At that time the court received in evidence the license or assignment from Activated Sludge, Limited to Guthard."
5. "And a modification thereof."
6. "Both of which were later received in evidence by this court at the trial of this cause."
7. "That Guthard had made an express cancellation was known to all counsel."
8. "Furthermore, the document bears a memorandum in the handwriting of counsel for defendant, raising a question as to whether such cancellation was sufficient to reconvey the title to Activated Sludge, Limited."
9. "The same exhibits were in evidence in this case."
10. "Consequently, it was known long prior to the decree that plaintiff's title depended upon an assignment by Activated Sludge, Limited, made after cancellation of a prior limited assignment or license to Guthard."

It is quite clear to us that, in making the statement upon which the defendant-petitioner bases its contention, what Judge Lindley had in mind was simply this: that the plaintiff had elected not to controvert any of the allegations, of the defendant's petition to vacate and reopen, by any affidavit of any party or the officer of any party or any attorney or counselor therefor, or by any witness whatsoever, except only in so far as the formal affidavit of Mr. Horton identified records of the Sanitary District of Chicago and the records of the various litigations prior to the

filing of the defendant's petition for leave to present its motion to the District Court. In his opinion Judge Lindley, in fact, said that "the court has had complete access and recourse to the documentary and parol testimony contained in the voluminous record of the cause."

When, therefore, Judge Lindley said in his memorandum-opinion that:

> "The issue presented is the same as if the petition had been filed and its sufficiency were attacked by motion to strike or dismiss"

he meant, and he could have meant only, that the plaintiff had not been heard by affidavit or otherwise upon the merits of the matters which constituted the subject matter of the defendant's petition to vacate and reopen.

Our reason for alluding to this matter at the outset of this brief is to say to this court, as we said to the Court of Appeals, that it is not bound,—as neither the Court of Appeals nor the District Court were bound—to confine itself to the allegations of the defendant's petition. No court, upon such a petition to vacate or reopen, as is now sought to be submitted to this Court, is bound to accept its factual allegations for the purpose simply of testing the sufficiency of those allegations,—as upon a demurrer or a motion to dismiss a bill of complaint.

It is only by the employment of this clever stratagem for eliminating from "the record herein" and from this Court's consideration, all of the great mass of factual evidence in contradiction of the defendant's petition to vacate the decree and reopen the case, that counsel for the defendant-petitioner are able to present to this Court a more or less blood-curdling narrative of "information and belief" (nothing more) with which to contrast well settled and undisputed principles of law.

A Few of the More Salient and General Facts.

In spite of the fact that the petition for a writ of certiorari herein purports to list three parties as "plaintiffs-respondents," there is, in fact, but a single plaintiff-respondent herein, namely, Activated Sludge, Inc. Ever since January 25, 1928, there has been only this one plaintiff to the patent infringement cause of action. This brief is filed on its behalf in opposition to the petition for writ of certiorari. As we shall show herein, there is no reason for allowance of the writ.

This is a patent infringement suit in which there never have been any conflicting decisions between circuits. In fact, all of the decisions of every court where the patents in suit have been presented, have been uniformly, and without exception, decided in favor of the plaintiff.

There is no matter of general public importance presented, because the patents in suit have long since expired and the defendant is the only party against whom a suit is pending. More than one hundred and fifteen municipalities have recognized the validity of the patents in suit and have taken licenses under them.

There is presented no question of conflict in deciding a rule of law, because the decision which is sought to be reviewed simply decided a long list of factual controversies,—contrary to petitioner's contentions.

As this Court has stated many times, it is important that the Court be consistent in not granting the writ of certiorari

> "except in cases involving principles the settlement of which is of importance to the public as distinguished from that of the parties, and in cases where there is a real and embarrassing conflict of opinion and authority between the circuit courts of appeal. The present case certainly comes under neither head."

Layne & Bowler Corp. v. *Western Well Works*, 261 U. S. 387, 393.

This case, like that cited, "certainly comes under neither head".

This Is the Third Attempt to Obtain Certiorari in this Litigation, Certiorari Having Already Been Twice Refused.

This case has now been pending in the courts for more than sixteen years. The original bill of complaint was filed on September 19, 1924 by Edgar C. Guthard and Activated Sludge, Limited, a British corporation, as plaintiffs. At the time the original complaint was filed, Activated Sludge, Limited, was the owner of the legal title to the patents in suit, all of which related to processes and apparatus for the treatment of sewage. Edgar C. Guthard was the holder of a somewhat limited exclusive license thereunder. On January 27, 1927, the Guthard license was terminated and canceled. On February 24, 1927, Activated Sludge, Limited, the British corporation, assigned all of the right, title, and interest in and to the patents in suit, to the present sole plaintiff, Activated Sludge, Inc., a corporation of Delaware.

On January 25, 1928, Activated Sludge, Inc., filed in this cause an original bill in the nature of a supplemental bill of complaint. It set forth the facts with respect to the transfer of title to the patents, pending the suit. The District Court dismissed the original bill in the nature of a supplemental bill of complaint, one reason given being that the defendant had filed, and there was pending against the original plaintiffs, a counterclaim charging acts of harassment by reason of infringement notices and the like, which said original plaintiffs were alleged to have caused to be

sent out. Upon appeal, the Seventh Circuit Court of Appeals reversed the order of the District Court on May 16, 1929, and held that the pleading filed by Activated Sludge, Inc., was a good pleading, and that the original plaintiffs, Edgar C. Guthard and Activated Sludge, Limited, could be retained in the case as cross-defendants to the defendant's counterclaim, even though the new plaintiff, Activated Sludge, Inc., would be the only plaintiff upon the patent infringement claim. The opinion of the Seventh Circuit Court of Appeals upon that appeal is reported in 33 Fed. (2d) 452.

The First Petition for a Writ of Certiorari.

In the meantime, Activated Sludge, Inc. had filed a complaint against the City of Milwaukee, charging infringement of the patents which are here in suit. The defendant in that case was represented by the same counsel who then represented the present defendant, some of whom still represent the present defendant. The real record is replete with evidence that the defendants in the two cases acted in full concert and with full knowledge of the proceedings and proofs in both cases.

The suit against the City of Milwaukee was first reached for trial. After a long trial and voluminous briefs, the District Judge on February 7, 1933, filed a 68 page printed opinion, which is not reported, finding the patents in suit to be valid and infringed, and holding that they were owned by the sole plaintiff, Activated Sludge, Inc., and granting the relief prayed. On appeal, the decree of the District Court was affirmed by the Seventh Circuit Court of Appeals on March 2, 1934, with the exception that an injunction against the defendant was refused on the ground that such injunction might be injurious to public health and

welfare. The opinion of the Seventh Circuit Court of Appeals on that appeal is reported in 69 Fed. (2d) 577.

On July 9, 1934, the City of Milwaukee filed a petition for certiorari in this court, together with a supporting brief and the eight-volume record comprising 6287 pages. That was No. 165 of the October Term, A. D., 1933. Respondent's brief was filed on October 1, 1934, and certiorari was denied on October 8, 1934, 293 U. S. 576.

The Second Petition for a Writ of Certiorari.

The present case against the Sanitary District of Chicago was reached for trial on May 17, 1932, and was subsequently tried upon the original bill in the nature of a supplemental bill of complaint filed by Activated Sludge, Inc., and upon the counterclaim of defendant against Edgar C. Guthard and Activated Sludge, Limited. On October 18, 1934, the District Court filed an opinion reported in 8 Fed. Supp. 329, and on February 8, 1935, entered a decree finding valid and infringed, the patents in suit Nos. 1,247,540, 1,247,542, 1,282,587, 1,286,017 and Re. 15,140. The decree also held that Activated Sludge, Inc., was the owner of the patents and of all rights thereunder. The decree also dismissed *finally* the counterclaim against Edgar C. Guthard and Activated Sludge, Limited. No appeal was taken from this latter portion of the decree, and Edgar C. Guthard and Activated Sludge, Limited, were finally dismissed from this suit, and have not been parties in any respect since February 8, 1935.

Upon an appeal to the Seventh Circuit Court of Appeals from so much of the decree as related to patent infringement, the decree of February 8, 1935 was affirmed in all respects, the court's opinion of June 16, 1937, being reported in 90 Fed. (2d) 727.

On September 13, 1937, the defendant herein filed a petition for certiorari and supporting brief in this court, No. 407 of the October Term, 1937. At the same time, there was also filed a nine-volume record comprising 5817 pages. Respondent's brief was filed on October 8, 1937, and certiorari was refused on October 25, 1937, 302 U. S. 736.

This Third Petition for a Writ of Certiorari.

Defendant's present petition for certiorari is, therefore, the third attempt by defendant's counsel to have the subject matter of this case reviewed by the Supreme Court of the United States.

In both of their earlier attempts, the contention has been made that it was a matter of great public importance, and that in each case the Seventh Circuit Court of Appeals had ignored earlier opinions of this court and had decided questions of law differently than had other courts. In each case, it was shown that these contentions were quite contrary to the facts, and were without support. In the present third attempt to obtain a writ of certiorari, it is again urged that this matter is of great public importance, and it is again urged that the Seventh Circuit Court of Appeals has ignored earlier opinions of this court and has decided questions of law differently than have some other courts.

The fact is, that this case is of no importance to any but the parties hereto. All of the patents in suit have long since expired, and there is no suit pending, or possible, against any other party alleging infringement of those patents.

The fact is, that in this case the decision by the District Court, and the affirming decision by the Seventh Circuit Court of Appeals, which is sought to be reviewed, do not

involve any conflict or dispute whatsoever with any decisions or rules of law laid down by this court or by any Circuit Court of Appeals.

The fact is that defendant's contentions now presented in this case, were all decided against defendant, both by the District Court and by the Circuit Court of Appeals solely upon factual questions and not at all upon any controverted legal principles.

The entire dispute which defendant seeks now to present to this Court is a factual dispute. It does not involve a single disputed question of law. Like the two earlier attempts for certiorari, this present attempt to prolong this sixteen year old litigation should likewise be refused.

The Questions Which Were Decided by the Seventh Circuit Court of Appeals and Which Petitioner Now Seeks to Review Were Factual Questions. In Its Petition to this Court Defendant Pretends that Its Disproved Contentions Are Facts and Ignores the Contrary Findings of the Courts as to the Actual Facts.

After this court refused to grant a writ of certiorari in this case on October 25, 1937, the mandate of the Seventh Circuit Court of Appeals affirming the decree of February 8, 1935, was duly issued. Thereafter proceedings were commenced looking to a determination in an accounting of the profits and damages which might be due to the plaintiff by reason of defendant's adjudged infringement.

While these proceedings were pending, the defendant on October 21, 1939, applied to the Seventh Circuit Court of Appeals for leave to present to the District Court a motion for leave to present a petition to reopen the interlocutory decree of February 8, 1935, to the end that

alleged newly discovered evidence might be introduced with a view of vacating the interlocutory decree and dismissing the suit. On January 20, 1940, the United States Circuit Court of Appeals for the Seventh Circuit granted leave to defendant to present its said motion to the District Court, specifically admonishing both court and counsel, however, that it had not passed upon or considered any of the issues presented upon the petition, and saying:

> "Whether petitioner has been diligent, whether the newly discovered evidence is material, or if material merely cumulative, and other questions which may be found essential to the granting of any relief, must be determined by the District Court. The granting of this application is made with the clear understanding that we have not considered the merits or the rights of the petitioner to the relief it seeks. Determination of the merits of the application is entirely for the District Court. It is perfectly free to grant or refuse the hearing, and it must determine the effect of such evidence. The leave which we grant must be so construed by counsel and the District Court" (R. p. 436).

After this consent by the Seventh Circuit Court of Appeals, the defendant applied to the District Court for leave to file its petition to reopen the interlocutory decree, to the end that alleged newly discovered evidence might be introduced. That petition appears at page 3 *et seq.* of that part of the record which the petitioner has presented to this Court.

The Purely Factual Character of Every Question and Contention.

Briefly summarized, the petition alleges that the defendant had only recently discovered that Albert W. Dilling, a former chief engineer of the defendant, had participated in planning or recommending or constructing the sewage

treatment plants which were eventually found to infringe the patents in suit, and that after termination of his employment by the defendant, Mr. Dilling, together with three individuals, including Mr. Guthard, had been instrumental in securing for Mr. Guthard, certain license rights under the patents in suit. The defendant's petition asserted the fact to be that Mr. Dilling had at one time been connected with the equitable ownership of Guthard's license rights under the patents in suit, and that Dilling's short term equitable interest had been carefully concealed from the defendant by a long term, carefully planned conspiracy, in which the present plaintiff, Activated Sludge, Inc., was alleged to have been a participant. Although Activated Sludge, Inc. was the only plaintiff at the time said petition was filed, it, together with Edgar C. Guthard and Activated Sludge, Limited, former plaintiffs, and Albert W. Dilling, Franklin Mayo, Albert G. McCaleb, Activated Sludge Processes of America, and others who at no time had been parties to this suit, are jointly lumped together by defendant in said petition, and constantly referred to as "the plaintiffs".

The petition alleges that Dilling and his associates obtained license rights from Activated Sludge, Limited, and that the rights in effect amounted to an assignment of title to the patents in suit to Edgar C. Guthard as trustee for Dilling and his associates. The petition alleges that "the plaintiffs" in their conspiracy to conceal the presence of Dilling in this enterprise, prepared documents attempting to transfer title to the patents in suit back to Activated Sludge, Limited, from which the title of Activated Sludge, Inc. was derived, but which were ineffective to do so. Defendant asserted, therefore, that title to the patents in suit did not rest in Activated Sludge, Inc., the plaintiff, but actually remained in Activated Sludge Processes of America, a so-called Massachusetts Trust form of organization,

of which Albert W. Dilling, Edgar C. Guthard, Franklin Mayo, and Albert G. McCaleb, were the beneficiaries.

It was the contention of defendant in its petition that the attempts by "the plaintiffs" to conceal the one-time interest of Dilling amounted to such inequitable conduct that if the facts had been presented at the trial the complaint would have been dismissed because of "the plaintiffs' " unclean hands and sullied conduct.

Activated Sludge, Inc., in opposition to the petition so presented to the District Court, presented no new evidence or testimony, but filed a notice stating that at the hearing it would rely upon the records, briefs, and transcripts of proceedings which were then on file in the United States District Court for the Northern District of Illinois, the United States District Court for the Eastern District of Wisconsin, and the United States Circuit Court of Appeals for the Seventh Circuit, in the previous litigations involving the City of Milwaukee and its Sewerage Commission, and the Sanitary District of Chicago. This notice of the material upon which the plaintiff would rely, appears at pages 105 and 106 of the so-called "record" presented by the petitioner. It is clear from this notice that the records in all of those cases were part of the record upon which the petition presented to the District Court was finally denied. Yet none of these records and transcripts are included in the "Transcript of Record" which the defendant has now filed in this court in support of its petition for a writ of certiorari. There is not, therefore, before this court the material upon which the decisions of the District Court and of the Seventh Circuit Court of Appeals were based.

The records in those previous litigations as supplemented by the records identified by the plaintiff's notice herein, do prove conclusively that the petitioner's contentions were without foundation in fact. For instance:

1. The petition asserts that defendant's infringing plants were built under the supervision of Albert W. Dilling (R., p. 7). The record shows (R., p. 437-439 and exhibits cited), and the District Court and the Court of Appeals both found therefrom (R., p. 892, 893, 920), that the infringing plants were designed and built in their entireties either before Dilling was ever employed by defendant, or after he had left its employ.

2. The petition asserts that Dilling was responsible for the adoption of the infringing apparatus and process in the defendant's "North Side plant" (R., p. 7). The record shows (Certiorari Record No. 407 of 1937, pp. 1583-4), and the District Court and the Court of Appeals both found therefrom (R., pp. 893, 920), that the "North Side plant" was designed and recommended by an independent commission of engineers, specially selected for that purpose, and which did not include Dilling.

3. The petition alleges that the defendant's plans to build extensive sewage treatment works became known in some confidential manner to Mr. Dilling while he was in defendant's employ (R., p. 7). The record shows (Certiorari Record No. 407 of 1937, pp. 1076-1081), and the District Court and the Court of Appeals both found therefrom (R., p. 895, 896, 920), that those general plans had been adopted and had been given wide publicity many years earlier.

4. The petition asserts that the defendant had no knowledge that Dilling had ever had any interest, or claimed any interest, in the patents in suit, until immediately before it presented its petition (R., p. 3, 9, 14). The record shows, (R., p. 350, 351, 371,) and the District Court and the Court of Appeals both found

therefrom (R., pp. 888, 889, 920), that Dilling's claim to an interest had been a matter of public record for many years prior to the filing of the petition, and that defendant had had express written notice thereof on January 7, 1936, nearly four years before defendant's petition alleging "newly discovered evidence" was presented, and again on July 7, 1938, a year and a half before defendant's petition was presented.

5. The petition alleges that it was not until immediately prior to the presentation of the petition (R., p. 3, 9) that defendant learned "the facts" upon which it argued that plaintiff did not have good title to the patents in suit. The record shows, (R., pp. 358-369) and the District Court and Court of Appeals both found therefrom, (R., p. 888, 920) that the same argument could have been made at the trial and in fact the same counsel made precisely the same argument relative to title in precisely the same language in a brief filed in the Milwaukee litigation more than two years earlier.

6. The petition asserts that defendant learned only shortly prior to presenting its petition (R., p. 35), that the Guthard license was, in fact, an assignment and had never been effectively reassigned. The record shows (R., p. 355), and the District Court and Court of Appeals both found therefrom (R., p. 887, 920), that defendant's counsel had raised that very question in 1929, ten years earlier, and had made written notations thereof which appear in the record but that the then counsel for the defendant had discarded the inquiry at that time as not worth pursuing.

7. The petition asserts that "the plaintiffs" (plural) suppressed and concealed material evidence (R., pp. 35, 36). The record shows (R., pp. 414, 432

and portions cited), and the District Court and Court of Appeals both found therefrom (R., pp. 885-899, 920), that each item of evidence alleged to have been suppressed and concealed had always been readily available to anyone who might think it material, but that defendant had made no effort to introduce it in spite of the fact that it had had actual notice of its existence for many years prior to the trial of the cause.

8. The petition asserts that two of defendant's witnesses testified falsely at the trial (R., p. 22). The record shows (R., pp. 347-350) and the District Court and the Circuit Court of Appeals both found therefrom (R., pp. 899, 920) that these witnesses did not give false testimony.

The foregoing are a few of the principal assertions made by defendant's petition to vacate the interlocutory decree on the ground of "newly discovered" evidence. All of these assertions were shown conclusively by the records in the prior litigations to be wholly unfounded. They are sufficient, however, to demonstrate to the court that the questions which petitioner would like this court to review by certiorari, were, in fact, all factual questions which have been uniformly decided contrary to petitioner's assertions.

That the contentions and assertions made in defendant's petition were completely disproved by the contents of the record in this cause and in the earlier litigations, without the introduction of any new evidence or testimony, is thoroughly well known to petitioner. The fact that these assertions were completely disproved by the records in the prior litigations was well known to the Circuit Court of Appeals for the Seventh Circuit. There was never any additional testimony taken therefore in the District Court to disprove the assertions and contentions made

in the defendant's petition. There has never been any misapprehension on that score by any of the parties or courts which have had to do with this matter. When, therefore, the petitioner asserts to this court that the Circuit Court of Appeals for the Seventh Circuit made an erroneous statement in its opinion that the District Court heard voluminous evidence, petitioner is deliberately attempting to mislead this court into the belief that the Court of Appeals erroneously thought that new evidence and testimony had been taken before the District Court. The fact is that the District Court did hear "voluminous evidence" in opposition to defendant's petition, but that "voluminous evidence" had been heard and received many years earlier. This was all thoroughly well known to the Circuit Court of Appeals for the Seventh Circuit.

Even the Petitioner's Arguments Are Necessarily Arguments of Fact,—in Contradiction of the Findings of the District Court and the Court of Appeals.

Turning to the brief which the petitioner presents to this court in support of its petition for a writ of certiorari: it is at once apparent from the reasons there given that all of the questions which the petitioner now seeks to review were, in fact, mere factual questions. Section 1 of defendant's argument, at page 19 of its brief, is that

> "the respondents should be barred from all relief in this suit on account of their sullied conduct in suppressing and concealing evidence from the petitioner and courts, and it makes no difference that such evidence, if it had been known to and introduced by petitioner during the trial, might not have affected the result."

The conclusive answer to that primary argument made in petitioner's brief, is that the District Court and the

Circuit Court of Appeals for the Seventh Circuit have found from the records that "the respondents" have not been guilty of "sullied conduct," and that evidence has not been suppressed or concealed by "the respondents," or from the petitioner or the courts.

In presenting its argument with respect to the *Keystone Driller* cases, the petitioner assumes that the respondent has been guilty of suppressing and concealing evidence. However, the District Court and the Court of Appeals have both found the facts to be otherwise. If the courts have been right in their determination of the facts, then the principle of the *Keystone Driller* cases cannot be applicable to this case, in which there has been no suppression or concealment of evidence.

The petitioner's second point asserted at page 26 of its brief, is that

> "The respondents should be barred from all relief in this suit for the reason that it was institgated and prosecuted through the action of A. W. Dilling, former chief engineer of petitioner, who learned about the Activated Sludge patents, the sewage disposal plants found herein to infringe said patents and petitioner's vulnerability to patent litigation during his employment by petitioner."

The conclusive answer to this second contention of defendant is that the District Court and the Court of Appeals for the Seventh Circuit have both found from the records available to them that this suit was not instigated and prosecuted by Albert W. Dilling, and that whether Dilling did or did not learn about the Activated Sludge patents or defendant's sewage disposal plants, or its general plans for constructing sewage disposal plants, was in any event immaterial because those matters were given the widest possible publicity by the petitioner long prior to Dilling's employment by it and were available to every member of the public.

The third argument made by petitioner, commencing at page 30 of its brief, is that

> "Even though it may be argued that Activated Sludge, Limited, or Activated Sludge, Inc., is the equitable owner of the patents in suit (which is not true) it is well settled that the equitable owner of patents cannot maintain a suit for their infringement."

The conclusive answer to this argument is that the District Court and the Court of Appeals did not find that plaintiff's title to the patents in suit rested upon mere equitable ownership, but found and concluded that plaintiff had the full legal title to the patents in suit, and that the substance of the very argument now advanced upon this point could have been presented, and was actually raised, by the petitioner more than a decade earlier.

The three "arguments" which we have quoted are the only reasons which petitioner presents for the grant of a writ of certiorari. Clearly, the purpose of petitioner is not to correct any error of law or to correct any conflicts of opinion—the entire purpose of petitioner is to have this Court review questions of fact which have been uniformly decided contrary to petitioner's assertions.

Each of the arguments and reasons presented by the petitioner is premised upon an assertion or contention of fact which is precisely contrary to the facts as they actually exist, and as they have been found to be, both by the District Court and by the Circuit Court of Appeals for the Seventh Circuit. The conclusive answer to each of petitioner's contentions is found in the opinions of those courts. We have, therefore, reprinted the opinions as an appendix to this brief, precisely as the opinions appear in the petitioner's "record" commencing at pages 920 and 885, respectively.

As is immediately apparent from a reading of the opinions of the District Court and of the Circuit Court of Appeals for the Seventh Circuit, and from a comparison of

these opinions with the contentions advanced in the petition, the petitioner's only object, upon a writ of certiorari must be merely to have this Court review the evidence and the findings and inferences which the District Court and Court of Appeals have drawn therefrom, and to reach the conclusion that the facts are not what the lower courts have found them to be,—but rather what the petitioner now asserts them to be.

As this Court said in *General Talking Pictures Corp.* v. *Western El. Co.*, 304 U.S. 175, 178:

> "Granting of the writ would not be warranted merely to review the evidence or inferences drawn from it. Southern Power Co. v. North Carolina Pub. Serv. Co., 263 U.S. 508, 68 L. ed. 925, 926, 44 S. Ct. 164; United States v. Johnston, 268 U.S. 220, 227, 69 L. ed. 925, 926, 45 S. Ct. 496. Moreover, the decision on that point rests on concurrent findings. They are not to be disturbed unless plainly without support."

In this case, petitioner's assertions of conspiracy, fraud, and deception, have been found by both the District Court and the Court of Appeals to be without foundation in fact. In *United States* v. *Chemical Foundation*, 272 U.S. 1, 14, this Court said:

> "But both courts found that the United States failed to establish any conspiracy, fraud, or deception alleged. Findings of fact concurred in by two lower courts will not be disturbed unless clearly erroneous."

It has been the invariable practice of this Court to deny writs of certiorari which seek merely to review factual questions. Many times even after allowance of the writ, such cases have been dismissed upon the ground that the writ was improvidently granted.

Wisconsin Electric Co. v. *Dumore Co.*, 282 U.S. 813
Houston Oil Co. v. *Goodrich*, 245 U.S. 440.

Since the defeated defendant's petition for a Writ of Certiorari presents, in its real essence, merely a contra-

diction, "on information and belief," of the facts found by the Circuit Court of Appeals for the Seventh Circuit and the District Court, we submit that the petition for a writ of certiorari should be denied.

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